

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

HENRY G. BURRELL, JR.,
Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Agency.

DOCKET NUMBER
BN-0752-97-0069-I-1

DATE: MAR 31 1999

William J. Lafferty, Esquire, Lafferty & Lafferty, Burlington, Massachusetts,
for the appellant.

Elizabeth F. Mason, Esquire, Boston, Massachusetts, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we GRANT his petition for review pursuant to 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 Effective September 29, 1995, the agency reassigned the appellant from his GM-13 position of Supervisory Grants Specialist (working title: Chief, Grants

Information and Management Section) to the GS-13 position of Senior Grants Specialist. Initial Appeal File (IAF), Tab 12, Subtab 4P. On January 30, 1997, the appellant filed this appeal, asserting that his reassignment was a constructive demotion because the agency retitled and upgraded his former position to a GS-14 Supervisory Grants Specialist (working title: Chief, Grants Management Unit) four days before his reassignment, the duties of this upgraded position were virtually identical to the duties of his former GM-13 position, and he was not selected for the upgraded position. IAF, Tabs 1, 3, 18, 19. In the alternative, he claimed that the agency failed to comply with reduction in force (RIF) procedures when it reassigned him during its 1995 reorganization. *Id.* He further claimed that his reassignment constituted race discrimination and reprisal for equal employment opportunity (EEO) activities. *Id.* He requested a hearing. IAF, Tab 1. The administrative judge (AJ) afforded the appellant an opportunity to submit evidence and argument proving the Board's jurisdiction over the appeal. IAF, Tabs 2, 7, 18.

¶3 The AJ then issued the initial decision dismissing the appeal for lack of jurisdiction. He found that the Board lacks jurisdiction over the appellant's nonselection for a promotion, that the appellant failed to establish that he was constructively demoted, and that the Board lacks jurisdiction under RIF procedures to adjudicate a constructive demotion claim. He further found that the appellant was not entitled to a hearing because he failed to make nonfrivolous factual allegations of Board jurisdiction. In light of his jurisdictional determination, he did not address the appellant's discrimination claims or the timeliness issue. Initial Decision (ID) at 2-6.

¶4 The appellant has timely filed a petition for review (PFR), *see* PFR File, Tab 4, and supplements to his PFR, *see id.*, Tabs 6-9,¹ arguing that he raised

¹ The first three supplements to his PFR were filed before the extended deadline for filing his PFR and, as such, are timely. The fourth supplement contains citations to relevant

nonfrivolous factual allegations of Board jurisdiction and that the AJ therefore erred by denying his request for a hearing.² The agency has timely responded to his petition. PFR File, Tab 5.

ANALYSIS

¶5 To establish a claim of constructive demotion, an appellant must show that, at the time of his reassignment, (1) his former position was misclassified and should have been upgraded due to a classification error or a change in the classification standards (rather than due to a planned management action), and (2) he met the legal and qualification requirements for promotion to the higher grade. *See Bittner v. National Credit Union Administration*, 76 M.S.P.R. 380, 383 (1997). A constructive demotion is simply any assignment away from a position that should have been classified at a higher grade--either because it was previously classified erroneously or because new classification standards should have been applied, rather than because of the addition of duties or responsibilities through a planned management action--where the employee met the legal and qualification requirements for promotion to the higher grade. *Id.* Because, in such a situation, the employee was entitled to a noncompetitive promotion prior to his reassignment, his reassignment away from that position had the effect of a demotion. *Id.* Where an appellant makes nonfrivolous allegations that the Board has jurisdiction over the appeal, he is entitled to a jurisdictional hearing. *See id.*; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

¶6 In support of his constructive demotion claim, the appellant alleged, in a sworn affidavit, that: From 1988 through 1995, he held the GM-13 position of

supplemental authorities authorized by Fed. R. App. P. 28(j) and we therefore have considered it even though it was filed after the close of the record. *See Shivaee v. Department of the Navy*, 74 M.S.P.R. 383, 385 n.1 (1997).

² The appellant does not contest the AJ's findings with regard to the agency's alleged noncompliance with RIF procedures and we discern no error as to these findings.

Chief, Grants Information and Management Section; his position was retitled and upgraded to the GS-14 position of Manager, Grants Management; the duties and responsibilities of his former GM-13 position and the new GS-14 Manager, Grants Management position were virtually identical with only insignificant differences that were not grade-controlling; the GS-14 position was filled by competitively promoting someone else (hereinafter "the selectee") and the appellant was reassigned to the non-supervisory GS-13 position of Senior Grants Specialist; the appellant trained the selectee for the GS-14 position because the appellant had been successfully performing the duties of that position for about seven years; and after the selectee was reassigned pursuant with his request for a voluntary downgrade, the GS-14 position was again filled by competitively promoting a candidate other than the appellant. IAF, Tab 3. He further argued that the agency reassigned him and upgraded and retitled his former position merely because it wanted to provide higher grades for certain employees, not because of a planned reorganization as claimed by the agency. *Id.*

¶7 The agency disputed the appellant's allegations and contended that the appellant failed to show that his former GM-13 position was misclassified and should have been upgraded due to either a correction of a classification error or the issuance of new classification standards. IAF, Tab 13. In support of this contention, the agency submitted the position descriptions for the appellant's former GM-13 position and the upgraded GS-14 position, tending to show that the upgraded position involved additional duties. IAF, Tab 12, Subtabs 4A, 4M. For instance, unlike the job description for the appellant's former GM-13 position, the job description for the upgraded GS-14 position indicates that it involves establishing annual, multi-year, and long-range work plans and assuring that environmental justice and pollution prevention objectives are considered in the program planning process. *Compare id.*, Subtab 4A at 1-3 with *id.*, Subtab 4M at 2-3.

¶8 The agency also submitted an affidavit from Laurel Seneca, a Human Resources Officer, in which she asserted that: The appellant's former GM-13 position was reconfigured in September 1995 as part of a planned reorganization; during this reorganization, a similar but higher graded position, the GS-14 position of Supervisory Grants Specialist (working title: Chief, Grants Management Unit), was created; and she classified this new GS-14 position at a higher grade than the appellant's former position because the new GS-14 position, as a result of the reorganization, "reported directly to the Office Director, a Senior Executive Service (SES) position (the pre-reorganization position had reported to a branch chief who in turn reported to the SES Division Director)" and "had additional authority and responsibility (in effect, combining pre-reorganization section chief and branch chief duties)." IAF, Tab 13, Attachment A.

¶9 Seneca asserted that the selectee for the GS-14 position could not be promoted into that position at the GS-14 level due to an agency-wide freeze on promotions, and the agency reassigned the selectee to a GS-13 position (with promotion potential to a GS-14), with the understanding that he would be promoted after the freeze was lifted. *Id.* She further asserted that she used the "[a]ppellant's pre-reorganization [GM-13] position description (with a revised cover sheet to reflect the new organizational structure) for the selectee's reassignment" in order to "expedite the action relating to the selectee for the [new] Grants Management Unit Chief position in light of an impending September 29, 1995 deadline for completion of the [agency's] reorganization." *Id.* When the selectee was later reassigned pursuant to his request for a voluntary downgrade and, after a period of time with an acting Grants Management Unit Chief, Seneca asserted, the GS-14 position was again filled by competitively promoting a candidate other than the appellant. *Id.* Seneca asserted that the appellant was eligible for promotion to the GS-14 Supervisory Grants Specialist position, and the agency's records support this assertion. *Id.*; *see also* IAF, Tab 12, Subtab 4J.

¶10 In response to the agency's evidence and arguments, the appellant claimed that the fact that the agency used the same position description for his former GM-13 position and the GS-13 (with promotion potential to GS-14) position to which the selectee was reassigned proves that he suffered a constructive demotion when he was reassigned from his former GM-13 position. IAF, Tab 19. He further claimed that the alleged differences between his former GM-13 position and the upgraded GS-14 position identified by the agency were no more than a change in reporting procedures, i.e., the incumbents reported to different persons. *Id.* Such a change, the appellant claimed, was not grade-controlling. *Id.*

¶11 Without holding the appellant's requested hearing, the AJ found that the appellant neither alleged nor offered any evidence to show that his former GM-13 position was misclassified and entitled to a higher grade either as a result of a classification error or the application of new classification standards. ID at 5-6. He further found that "[t]he uncontradicted documentary evidence establishe[d] that the only grounds relied on by the agency for a higher grade level were the new supervisory controls, management authorities, and responsibilities assigned to the new position pursuant to the agency's reorganization." ID at 6. "A showing that these additional assigned duties and responsibilities were either not bona fide or not grade-controlling," the AJ found "does not support an inference that the remaining duties and responsibilities do support a higher grade." *Id.* He therefore concluded that the appellant failed to raise nonfrivolous allegations of jurisdiction. *Id.* For the reasons discussed below, we find that these findings are insufficient to support his conclusion.

¶12 We first find that, to the extent that the appellant is alleging that his former GM-13 Supervisory Grants Specialist position should have been classified as a GS-13 Supervisory Grants Specialist position (with promotion potential to a GS-14) at the time of his reassignment to the GS-13 Senior Grants Specialist position (with no promotion potential), this allegation does not support a

constructive demotion claim because reassignment from a position with known promotion potential to one without such expectancy does not constitute an appealable reduction in grade. *See Lange v. Department of Transportation*, 1 M.S.P.R. 700, 701-03 (1980); *see also Sheehan v. Department of the Navy*, 66 M.S.P.R. 490, 494-95 (1995) (the Board does not generally distinguish between positions of equal grade on the basis of promotion potential).

¶13 Second, we find that, although the appellant's allegations below could be construed, as the AJ found, *see* ID at 5-6, as allegations that the agency improperly failed to select him for a promotion or as allegations that the GS-14 position should have been classified at a lower grade, matters which the AJ correctly found are not within the Board's jurisdiction, *see id.*, they also can be construed as allegations that the appellant's former position was misclassified at the time of his reassignment and should have been classified at a higher grade either because of a classification error or because new classification standards should have been applied. The fact that the appellant did not use the precise term "misclassified" or the exact phrases "correction of a classification error" or "the application of new classification standards" does not require a different result.

¶14 Here, the appellant alleged below that his GM-13 position was upgraded, without a significant change in duties or responsibilities, at the time he was reassigned to another position. IAF, Tabs 3, 19. If true, this would tend to show that the upgrading could have been due to the correction of a classification error or the application of new classification standards. *Cf. Ellis v. Department of the Navy*, 76 M.S.P.R. 102, 105-07 (1997) (remanding for a jurisdictional hearing where the appellant alleged that all of the GS-5 Supply Technician positions were upgraded, without a significant change in duties and responsibilities, after she was reassigned to another GS-5 position); *Spicer v. Department of Defense*, 59 M.S.P.R. 359, 363-66 (1993) (the Board found a constructive demotion where the evidence showed that there were no significant, grade-controlling differences

between the duties and responsibilities of the positions in question); *Young v. Department of the Navy*, 53 M.S.P.R. 384, 386 (1992) (evidence regarding the similarity between the positions in question was relevant to the issue of whether the appellant's former position was upgraded due to a change in the classification standards); *Frazier v. Department of Transportation*, 26 M.S.P.R. 190, 191-92 (1985) (where the appellant raised specific and detailed factual allegations in his constructive demotion appeal claiming that the GS-12 Staff Engineer position which he had encumbered for three years was virtually identical to the GS-13 Staff Engineer position and that the agency changed the title of his former position and assigned another employee to fill the GS-13 position, the Board found that he should have been afforded his requested jurisdictional hearing).

¶15

A nonfrivolous allegation of jurisdiction requires more than just a bald allegation, and an AJ may request, as the AJ did here, *see* IAF, Tabs 2, 8, sufficient evidence to determine if there is any support for such an allegation before granting a jurisdictional hearing, *see Ellis*, 76 M.S.P.R. at 106-07. We have held, however, that the pertinent evidence regarding the circumstances surrounding a reclassification of an employee's former position is likely to be within the possession and control of the agency. *See id.* at 107. Here, the AJ suspended discovery pending his determination whether the appeal could be decided based on the documentary evidence of record or whether a jurisdictional hearing was warranted. IAF, Tab 8. The appellant lamented the absence of discovery and its effect on his ability to pursue his appeal. IAF, Tab 14. Furthermore, the appellant did submit a sworn affidavit, attesting to the alleged jurisdictional facts in a somewhat specific and detailed manner. IAF, Tab 3. We therefore find, under these circumstances, that the appellant raised nonfrivolous jurisdictional allegations regarding the upgrading of his former position entitling him to a jurisdictional hearing.

¶16 Regarding the AJ's finding that "[t]he uncontradicted documentary evidence establishe[d] that the only grounds relied on by the agency for a higher grade level were the new supervisory controls, management authorities, and responsibilities assigned to the new position pursuant to the agency's reorganization," in effect, the AJ found that the GM-13 Supervisory Grants Specialist position was upgraded because of the addition of duties and responsibilities through a planned management action, i.e., the agency's reorganization. ID at 6. Although the AJ did not specify this purported "uncontradicted documentary evidence," he appears to be referring to Seneca's affidavit and the position descriptions for the appellant's former GM-13 position and the upgraded GS-14 position, all of which were submitted by the agency. *Id.*; see IAF, Tab 12, Subtabs 4A, 4M, and Tab 13, Attachment A. The appellant, however, asserted in his affidavit that the differences between his former position and the upgraded position were insignificant and not grade-controlling, and that his former position was upgraded merely because the agency wanted to provide higher grades for certain employees, not because of a planned reorganization. IAF, Tab 3. Thus, the AJ appears to have weighed the evidence and resolved the conflicting assertions of the parties by finding the agency's evidence dispositive on the issue of whether the upgrading of the Supervisory Grants Specialist position was due to a correction of a classification error or the application of new classification standards rather than to a planned management action. This, he was not allowed to do. See *Bittner*, 76 M.S.P.R. at 386; *Ferdon*, 60 M.S.P.R. at 329.

¶17 For the foregoing reasons, we conclude that the appeal must be remanded for a jurisdictional hearing because the appellant raised a nonfrivolous allegation of jurisdiction, i.e., he asserted in an affidavit that his GM-13 position was upgraded, without a significant change in duties or responsibilities, at the time he was reassigned to another position. See *Ellis*, 76 M.S.P.R. at 105-08; *Frazier*, 26 M.S.P.R. at 191-92. On remand, however, he must do more than that; he must

meet his burden of proving that, at the time of his reassignment, his former GM-13 position should have been classified as a grade 14 position either because it was previously classified erroneously or because new classification standards should have been applied, rather than because of the addition of duties or responsibilities through a planned management action.³ See *McCullum v. Department of Veterans Affairs*, 80 M.S.P.R. 166, ¶ 6 (1998); *Bittner*, 76 M.S.P.R. at 383.

ORDER

¶18 On remand, the AJ shall permit the parties to conduct discovery and submit additional evidence and argument and shall afford the appellant a jurisdictional hearing. If the AJ finds that the Board has jurisdiction over the appeal and also finds that the appeal was timely filed or that good cause was shown for the untimely filing, he shall adjudicate the merits of this appeal, including the appellant's claims of discrimination and EEO reprisal.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

³ As discussed above, there is no dispute that the appellant was reassigned from his GM-13 position and that he met the legal and qualification requirements for promotion to the upgraded GS-14 position.